Jury Instructions

Dakter v. Cavallino: An Anomaly or the New Normal?

By Matthew S. Hefflefinger

Drawing from other decisions, defense attorneys can challenge *Dakter* and jury instructions that would impose greater duties of care upon truck drivers than upon the motoring public.

If a truck driver is paid to drive a truck, does that make him or her a professional under tort law? Should the truck driver be held to a higher standard of care than other motorists? Although the weight of authority suggests that there is no higher standard of care for a truck driver than any other motorist, a recent decision by the Supreme Court of Wisconsin suggests otherwise. In *Dakter v. Cavallino*, the Supreme Court of Wisconsin addressed whether the conduct of a truck driver should be evaluated taking what a reasonable truck driver would do under the same or similar circumstances into account. 2015 WI 67, 363 Wis. 2d 738, 866 N.W.2d 656 (Wis. 2015).

In *Dakter*, the plaintiff filed suit as a result of a collision that happened while he was making a left turn at an intersection in front of the truck driver. It had rained earlier, and the roadway was wet. While the plaintiff waited to make his left turn, a van approached from the oncoming lane and waited to make a left turn to proceed in the opposite direction. Both the van and the plaintiff's vehicle faced each other in the middle of the intersection while waiting to make left turns. After realizing that the van was stopped in front of him, the truck driver veered into the right turn lane. He then struck the plaintiff's vehicle, which was in the process of making its left turn. The evidence suggested that the truck driver was not exceeding the speed limit. After a 10-day trial, the jury found in favor of the plaintiff but reduced the award by 35 percent for contributory negligence, resulting in a net verdict of approximately $1.1 million. The negligence instruction that was read to the jury contained the following:

> At the time of the accident, the defendant… was a professional truck driver operating a semi tractor-trailer pursuant to a commercial driver's license issued by the State of Wisconsin. As the operator of a semi tractor-trailer it was [the defendant's] duty to use the degree of care, skill and judgment which a reasonable semi truck driver would exercise in the same or similar circumstances having due re-

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gard for the state of learning, education, experience, and knowledge possessed by semi truck drivers holding commercial driver's licenses. A semi truck driver who fails to conform to the standard is negligent. The burden is on the plaintiff to prove that [the defendant] was negligent.

The plaintiff asserted that the jury must be instructed regarding the exercise of "ordinary care" by a "professional" truck driver. Under Wisconsin law, the plaintiff argued, standard of care instructions apply to a number of trades and professions, including medical negligence, nursing negligence, building contractor negligence, and teacher negligence. Furthermore, the plaintiff argued that section 299A of the Restatement (Second) of Torts specifically provides that defendants who possess special skill or knowledge are required to exercise a duty of care commensurate with that special skill or knowledge.

The defendants argued that truck drivers do not owe a higher standard of care than other drivers, given that the accident was one involving the ordinary negligence that applied to all drivers. The defendants argued that the defendant truck driver was operating his truck under the speed limit, was operating his vehicle in his lane of travel, and had a legal right to assume that the plaintiff would yield the right of way. Although the defendants' motion *in limine* to exclude standard of care testimony from the plaintiff's experts was granted, the defendants argued that the jury instruction read to the jury established a heightened duty of care, misstated the law, and improperly told the jury that the defendant truck driver had to conform to a heightened duty of care.

During trial, the plaintiff called two experts to testify regarding safety standards and practices that allegedly govern truck drivers. The first expert, a former truck driver safety instructor at a driver training program, testified that a semi-trailer truck with an empty trailer takes longer to stop. Furthermore, when the pavement is wet, a truck driver operating a semi-trailer truck must reduce his or her speed by a third, which the defendant truck driver did not do in this case. The second expert, a safety consultant, testified about the "cushion of safety," that is, the distance that truck drivers should maintain between the front of their trucks and the back of the vehicles in front of the trucks. The expert testified that the defendant truck driver had not maintained a proper "cushion of safety" when the accident occurred. The second expert also opined that an intersection is a location where a truck driver has the most likelihood of becoming involved in an accident, and accordingly, truck drivers should be extra cautious and reduce their speed correspondingly. The defendants' safety expert testified that the defendant truck driver was driving in conformity with safe-driving practices and industry standards for drivers of commercial motor vehicles.

The facts presented to the jury to analyze involved issues that applied to all accidents involving the motoring public, including whether someone was driving too fast, whether someone kept a proper lookout, whether someone was following too closely, and who had the right of way. The case involved no Federal Motor Carrier Safety Regulation violations. Despite the fact that it had rained and the roadway was wet at or about the time of the accident, nothing in the opinion gave rise to the potential application of 49 C.F.R. §392.14, which states, "Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction." The case essentially involved a rather simple intersection accident.

The *Dakter* Appeals

On appeal, the Wisconsin Court of Appeals noted that a jury certainly could have misinterpreted the instruction and imposed a higher standard of care upon the driver defendant than the one generally imposed upon other drivers. Nevertheless, the Wisconsin Court of Appeals determined that any error in the challenged jury instruction was not prejudicial. In denying the defendants' request for a new trial, the Supreme Court of Wisconsin found that "[t]he truck driver negligence instruction did not misstate the law and was not misleading." In reaching its decision, the Supreme Court of Wisconsin relied upon the superior knowledge rule and the profession or trade principle.

Initially, the Supreme Court of Wisconsin looked to the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, section 12, which states, "If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person."

The comments to the Restatement suggest that this particular section has questionable application to the facts in *Dakter*. The comments state that section 12 "is easily justified when the actor is one of a limited of number parties that engage in an activity that poses distinctive and significant dangers," using an electric power company as an example. Further, the rule is justified "when the actor who possesses the above average knowledge or skills has a pre-existing relationship with the other party." As a result, when the relationship is one of economics, a plaintiff is presumably paying for the extra knowledge and skills that the defendant may bring to the relationship. The comments analyze the scope of section 12 further:

> Consider two cars that collide on the highway or two skiers who collide on a ski trail; if it turns out that one of the motorists is a professional driver or one of the skiers a professional ski instructor, this is a fortuity as far as the other motorist or the other skier is concerned. Moreover, to impose a higher level of liability on parties who have improved

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their knowledge and skills might have the effect, at least at the margin, of discouraging parties from making such improvements; in deciding whether to make the effort to acquire additional knowledge and skills, persons can anticipate that such an effort will impose on them a heightened burden of liability. Despite these concerns, on balance it is best to take persons' actual knowledge and skills into account when the level of their knowledge or skills exceeds the average. In determining which dangers the person knows or should know of, and which precautions the person can appropriately adopt, it simply is not possible to ignore what knowledge the person actually has. For example, if a motorist on a lightly traveled road happens actually to know, because of a recent driving experience, that a deep pothole lurks on the road ahead, the motorist can be found negligent for failing to slow down in approaching that pothole even though the typical motorist would be unaware of its existence. Tort law has always inquired into what the actor "knew or should have known;" so long as the actor has actually knowledge; the source of that knowledge has not been deemed material.

Moreover, given that all actual knowledge is taken into account, it is appropriate to take all actual skills into account as well. In fact, knowledge and skills cannot be easily distinguished; what the professional driver or skier has is a combination of the two. Moreover, an alternative rule that professes to exclude evidence of the actor's special skills would likely be eroded by the dynamics of litigation; in one way or another, the fact of those specials skills would end up coming to the attention of the jury. *It can be noted that even though the actor's extra skills can properly be considered, these skills do not establish for the actor a standard of care that is higher than reasonable care; rather, they provide a mere circumstance for the jury to consider in determining whether the actor has complied with the general standard of reasonable care.*

Restatement (Third) of Torts: Liability for Physical and Emotional Harm, §12, cmt. a (emphasis added).

The Supreme Court of Wisconsin noted that Wisconsin had adopted the superior knowledge rule, and it found that an actor with special knowledge or skill meets the standard of ordinary care by using that special knowledge or skill. The Supreme Court of Wisconsin did not in any way address the comments to section 12 and how they may limit its scope or application to the facts of the case before the court. What distinct and significant danger does a semi-truck driver create beyond the dangers created by all motorists? What preexisting relationship did the defendant truck driver have with the plaintiff? The court held that various Wisconsin statutes and the Federal Motor Carrier Safety Regulations make it clear that a semi-truck driver clearly has special knowledge and skill. Relying upon Federal Motor Carrier Safety Regulations that address commercial driver's license standards, as well as the required knowledge and the required skills of those holding a commercial driver's license, 49 C.F.R. §383.110, §383.111, and §383.113, the Supreme Court of Wisconsin specifically found that a semi-truck driver's conduct should be assessed by reference to the special competence required of semi-trailer truck drivers, not by reference to the conduct of an ordinary, reasonable driver.

As for the profession or trade principle, the Supreme Court of Wisconsin relied upon Restatement (Second) of Torts, section 299A, which states: "Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."

The comments to section 299A specifically state that the section applies "to any person who undertakes to render services to another in the practice of a profession, such as that of a physician or surgeon, dentist, pharmacist, oculist, attorney, accountant, or engineer." The comments elaborate that the section also applies to any person "who undertakes to render services to others in the practice of a skill trade, such as that of airplane pilot, precision machinist, electrician, carpenter, blacksmith or plumber." The Supreme Court of Wisconsin held that the scope of section 299A had broader applicability. The court found that section 299A "governs an actor in the performance of his or her occupation so long as reasonably performing that occupation requires acquired learning an aptitude developed by special training and experience." *Dakter,* 2015 WI 67, ¶ 81.

Without in any way addressing the comments, which obviously limit the scope of section 299A to those persons who undertake to render services to others, the Supreme Court of Wisconsin found that driving a semi-trailer truck constitutes a profession or trade encompassed by the profession or trade principle.

Although the defendants argued that the truck driver negligence instruction did nothing other than tell the jury that the truck driver defendant had a higher standard of care, the Supreme Court of Wisconsin disagreed. It found that the instruction was part of a lengthy set of negligence instructions given by the trial court, and when the jury instructions were read as a whole, the defendants did not suffer any prejudice. Interestingly, the Supreme Court of Wisconsin held that the negligence instructions read to the jury adequately conveyed that the standard of ordinary care applies to all drivers, including the plaintiff and the defendant truck driver.

The opinion from the Supreme Court of Wisconsin is troublesome because the facts of the case established that the accident was none other than one involving arguments typically encountered in any intersection accident. Furthermore, the Supreme Court of Wisconsin failed to analyze carefully the scope and the application of portions of the Restatement of Torts, which the court relied upon greatly in making its decision. In relying upon various portions of the Federal Motor Carrier Safety Regulations to suggest that the superior knowledge and the profession or trade principles applied, the Supreme Court of Wisconsin did not in any way address 49 C.F.R. §392.2, which provides that "every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction which is being operated." In essence, the Supreme Court of Wisconsin failed to address the defendants' argument that the Federal Motor Car-

rier Safety Regulations did not in any way change the defendant truck driver's common law duty under Wisconsin state law.

Cases Limiting *Dakter*

The *Dakter* decision certainly creates some challenges; plaintiffs' attorneys will continue to use the same tactics as the plaintiff's counsel in *Dakter*. They will continue to seek to impose a higher standard of care upon truck drivers than the care imposed upon other motorists. Although *Dakter* will likely be an opinion that they will cite in the future, the analysis of the court can be effectively challenged. Furthermore, there are a number of opinions that have refused jury instructions similar to those accepted by the court in *Dakte*r, including the following, presented chronologically.

Fredericks v. Castora

In *Fredericks v. Castora*, 360 A.2d 696 (Pa. Super. Ct. 1976), the defendant truck drivers were found not guilty during the trial. The plaintiff argued that the truck drivers should be held to a higher standard of care. The Superior Court of Pennsylvania held that there was only one degree of care in the law: the standard of care that may be reasonably required or expected under all the circumstances of a given situation. Accordingly, the trial court did not err in refusing an instruction that included a higher degree of care for the truck drivers in the case.

Cervelli v. Graves

The plaintiff in *Cervelli v. Graves*, 661 P.2d 1032 (Wyo. 1983), filed suit for injuries sustained when a cement truck driver collided with the pickup that he was operating. Although it was determined that the trial court erred in instructing the jury to disregard exceptional characteristics of either of the parties in determining negligence, the Supreme Court of Wyoming held that it would be improper to hold the cement truck driver to a higher standard of care because he was a professional truck driver. The opinion stated:

> It is one thing to say that… a jury can take into account an individual's exceptional knowledge or skill in determining negligence; it is quite another to say that as a matter of law, because he is a truck driver, an individual is held to a higher standard of care than other drivers. [Plaintiff] would… have us treat this as a professional truck driver's driver malpractice case. That we will not do.

61 P.2d at 1037–38.

Cahalan v. Rohan

In *Cahalan v. Rohan*, No. 03-2216 (PAM/RLE), 2004 U.S. Dist. Lexis 18465, 2004 WL 2065056 (D. Minn. Sept. 2, 2004), the plaintiff filed suit after an accident with a UPS van. The plaintiff argued that a reasonable UPS driver with training and experience comparable to defendant driver would have been able to avoid the accident by slowing down or by not changing lanes. The U.S. District Court for the District of Minnesota found that Minnesota law imposed one standard upon all drivers—ordinary negligence. Minnesota law did not recognize the standard of care beyond a reasonable and prudent ordinary person standard, even for professional drivers (relying upon *Blatz v. Allina Health Sys.*, 622 N.W.2d 376 (Minn. Ct. App. 2001) (declining to hold an ambulance driver to a standard of care beyond that or an ordinary driver)).

Tavorn v. Cerelli, et al.

The plaintiff in this case claimed injuries as a result of an accident while he was a passenger on a Detroit city bus that collided with a semi-tractor trailer. *Tavorn v. Cerelli, et al.*, No. 26811, 2007 Mich. App. Lexis 1860, 2007 WL 2189075 (Mich. Ct. App. July 31, 2007). The plaintiff argued that he was entitled to specialized jury instruction given that the defendant was a commercial truck driver. The Michigan Court of Appeals disagreed. It stated that a specialized instruction may have been warranted if the defendant had been driving a truck with hazardous materials and if plaintiff was injured by exposure to those hazardous materials. However, the court stated that it was "an ordinary traffic accident with an ordinary question: was the truck driver negligent in turning when he did rather than yielding the right-of-way and waiting for the bus to pass. [sic]" Although it may take a semi-tractor trailer longer to complete a turn, the Michigan Court of Appeals noted that that did not change the duty, which remained one of ordinary care.

Dahlgren v. Muldrow

In *Dahlgren v. Muldrow*, No. 1:06-cv-00065-MP-AK, 2008 U.S. Dist. Lexis 4103, 2008 WL 186641 (N.D. Fla. Jan. 18, 2008), the plaintiff was injured by the semi-tractor trailer when it failed to stop at an inoperative traffic signal. The defendants moved *in limine* to preclude the plaintiffs from making any statements or inferring that commercial vehicle operators are held to a higher standard of care, as well as to bar any jury instruction to that effect, also in a motion *in limine*. The U.S. District Court for the Northern District of Florida agreed, finding that the defendant truck driver was held to an ordinary standard of care. The district court further found that to allow the plaintiff to argue otherwise would misstate the law and prejudice the defendants.

Townsel v. Dadash, Inc.

The plaintiff in this case did not see a parked tow truck. *Townsel v. Dadash, Inc.*, No. 05-10-01482-CV, 2012 Tex. App. Lexis 3185, 2012 WL 1403246 (Tex. App. Apr. 24, 2012). After swerving to miss the tow truck, he hit another vehicle. The defendant tow truck operator prevailed during the trial, and the plaintiff argued on the appeal that he was entitled to an additional jury instruction regarding a "professional" tow truck driver. The Texas Court of Appeals concluded that the jury was properly asked to judge a person's conduct through "the degree of care that would be used by a person of ordinary prudence under the same or similar circumstances."

Southard v. Belanger

In *Southard v. Belanger*, 966 F. Supp. 2d 727 (W.D. Ky. 2013), the plaintiff filed suit after striking the rear portion of a tractor trailer. The plaintiff was exiting the interstate and struck the rear portion of the tractor trailer before it had completed a left turn. The plaintiff repeatedly referred to the defendant as a "professional driver" in her appellate brief and argued that a higher standard of care applied to tractor-trailer drivers. The U.S. District Court for the Western District of Kentucky disagreed, finding that all motor vehicle drivers, with the exception of those who carry passengers for hire, are held to the same standard of care. The court rejected the plaintiff's argument that the defendant truck driver

should have been held to a higher standard of care due to the fact that the defendant's conduct was more egregious given that he was a "professional driver."

General Defense Principles

Any type of jury instruction that imposes a higher standard of care upon a truck driver than the care imposed upon an ordinary motorist will be extremely prejudicial. Truck drivers and trucking companies typically encounter unfair bias and prejudice from the venire, and this will provide yet another burden that must be overcome at trial. The weight of authority, on the other hand, clearly establishes that plaintiffs should not be entitled to a jury instruction that permits imposing such a higher standard of care. Nevertheless, plaintiffs' attorneys will attempt to inject this theory into their cases as much as possible. Plaintiffs' attorneys may rely upon questionable experts with questionable opinions, and defense attorneys need to be prepared to challenge the admissibility of those opinions. Furthermore, defense attorneys need to use motions *in limine* effectively to prohibit plaintiffs' attorneys from attempting to suggest or to propose to a jury that the jury can infer that a truck driver owes a higher standard of care. Although *Dakter* does provide some challenges, the decision appears to be a rather incomplete analysis, at best. The court's broad interpretation of various provisions of the Restatement of Torts should limit the reach of the *Dakter* decision in other jurisdictions. It makes little sense to include a jury instruction that injects a higher standard of care for a truck driver when the facts of an accident involve issues that any type of motor vehicle accident involve. The actions of a truck driver are in no way different than the actions of the motoring public. FD